

Introduced by Senator Ortiz

(Principal coauthor: Assembly Member Jerome Horton)

January 26, 2006

An act to repeal and add Section 22963 of the Business and Professions Code, to amend Section 308.1 of the Penal Code, and to repeal Section 30101.7 of the Revenue and Taxation Code, relating to tobacco products.

LEGISLATIVE COUNSEL'S DIGEST

SB 1208, as introduced, Ortiz. Tobacco products.

(1) Existing law, the Cigarette and Tobacco Products Tax Law, requires every distributor of cigarettes to pay taxes, as prescribed, on the distribution of cigarettes. In addition to the requirement to pay taxes on the distribution of cigarettes, existing law also requires distributors and wholesalers of cigarette and tobacco products to be licensed by the State Board of Equalization. Existing federal law, known as the Jenkins Act, requires any person that sells or transfers, in interstate commerce, cigarettes into a state that taxes the sale or use of cigarettes to file and report specified information with the tobacco tax administrator of that state.

Existing law prohibits, except under specified circumstances, a retail sale of cigarettes that is not a face-to-face sale, as defined, and prohibits distribution of tobacco products through the mail. Existing law exempts a person from the face-to-face sale restriction, if that person has paid all applicable state taxes and is in compliance with the federal Jenkins Act.

This bill would repeal the face-to-face sale requirement, the related tax reporting provisions, and the prohibitions against distribution through the mail, and would, instead, with certain exceptions, prohibit shipping or transporting tobacco products to persons in California, and

would establish criminal and civil penalties for violation of this prohibition.

(2) Existing law prohibits the offer, sale, distribution, or importation of a tobacco product know as “bidis” or “beedies,” as defined, unless it is sold or intended for sale in business establishments that exclude minors.

This bill would amend the definition of “bidis” or “beedies” to include any product that is marketed and sold as “bidis” or “beedies” and would clarify that persons who violate this prohibition are subject to both criminal and civil liability.

(3) By changing the definition of related crimes, this bill would impose a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares that the
2 shipment of cigarettes and tobacco products sold via the Internet
3 or by telephone or by mail order to residents of this state poses a
4 serious threat to public health, safety, and welfare, and to the
5 economy of the state. The Legislature also finds that when
6 cigarettes and tobacco products are shipped directly to a
7 consumer, adequate proof that the purchaser is of legal age
8 cannot be obtained by the vendor, thereby enabling sellers of
9 cigarettes or tobacco products to evade provisions of law
10 designed to prevent sales to minors. It is also the Legislature’s
11 finding that by preventing shipment of cigarettes or tobacco
12 products directly to consumers, the state will be better able to
13 measure and monitor cigarette consumption and to better
14 determine the public health and fiscal consequences of smoking
15 and using tobacco products. The Legislature further finds that
16 existing penalties for cigarette bootlegging are an inadequate
17 deterrent.

1 SEC. 2. Section 22963 of the Business and Professions Code
2 is repealed.

3 ~~22963. (a) The distribution or sale of tobacco products~~
4 ~~directly or indirectly to any person under the age of 18 years~~
5 ~~through the United States Postal Service or through any other~~
6 ~~public or private postal or package delivery service at locations,~~
7 ~~including, but not limited to, public mailboxes and mailbox~~
8 ~~stores, is prohibited.~~

9 ~~(b) Any person selling or distributing tobacco products~~
10 ~~directly to a consumer in the state through the United States~~
11 ~~Postal Service or by any other public or private postal or package~~
12 ~~delivery service, including orders placed by mail, telephone,~~
13 ~~facsimile transmission, or the Internet, shall comply with the~~
14 ~~following provisions:~~

15 ~~(1) (A) Before enrolling a person as a customer or distributing~~
16 ~~or selling the tobacco product through any of these means, the~~
17 ~~distributor or seller shall verify that the purchaser is 18 years of~~
18 ~~age or older. The distributor or seller shall attempt to match the~~
19 ~~name, address, and date of birth provided by the customer to~~
20 ~~information contained in records in a database of individuals~~
21 ~~whose age has been verified to be 18 years or older by reference~~
22 ~~to an appropriate database of government records kept by the~~
23 ~~distributor, a direct marketing firm, or any other entity. The~~
24 ~~distributor or seller shall also verify that the billing address on~~
25 ~~the check or credit card offered for payment by the purchaser~~
26 ~~matches the address listed in the database.~~

27 ~~(B) If the distributor or seller is unable to verify that the~~
28 ~~purchaser is 18 years of age or older pursuant to subparagraph~~
29 ~~(A), he or she shall require the customer to submit an~~
30 ~~age-verification kit consisting of an attestation signed by the~~
31 ~~customer that he or she is 18 years of age or older and a copy of~~
32 ~~a valid form of government identification. For the purposes of~~
33 ~~this section, a valid form of government identification includes a~~
34 ~~driver's license, state identification card, passport, an official~~
35 ~~naturalization or immigration document, such as an alien~~
36 ~~registration receipt card (commonly known as a "green card") or~~
37 ~~an immigrant visa, or military identification. The distributor or~~
38 ~~seller shall also verify that the billing address on the check or~~
39 ~~credit card provided by the consumer matches the address listed~~
40 ~~in the form of government identification.~~

~~(2) The distributor or seller shall impose a two-carton minimum on each order of cigarettes, and shall require payment for the purchase of any tobacco product to be made by personal check of the purchaser or the purchaser's credit card. No money order or cash payment shall be received or permitted. The distributor or seller shall submit to each credit card acquiring company with which it has credit card sales identification information in an appropriate form and format so that the words "tobacco product" may be printed in the purchaser's credit card statement when a purchase of a tobacco product is made by credit card payment.~~

~~(3) The distributor or seller shall make a telephone call after 5 p.m. to the purchaser confirming the order prior to shipping the tobacco products. The telephone call may be a person-to-person call or a recorded message. The distributor or seller is not required to speak directly with a person and may leave a message on an answering machine or by voice mail.~~

~~(4) The distributor or seller shall deliver the tobacco product to the purchaser's verified billing address on the check or credit card used for payment. No delivery described under this section shall be permitted to any post office box.~~

~~(e) Notwithstanding subdivisions (a) and (b), if a distributor or seller complies with all of the requirements of this section and a minor obtains a tobacco product by any of the means described in subdivision (b), the seller or distributor is not in violation of this section.~~

~~(d) For the purposes of the enforcement of this section pursuant to Section 22958, the acts of the United States Postal Service or other common carrier when engaged in the business of transporting and delivering packages for others, and the acts of a person, whether compensated or not, who transports or delivers a package for another person without any reason to know of the package's contents, are not unlawful and are not subject to civil penalties.~~

~~(e) (1) For the purposes of this section, a "distributor" is any person or entity, within or outside the state, who agrees to distribute tobacco products to a customer within the state. The United States Postal Service or any other public or private postal or package delivery service are not distributors within the meaning of this section.~~

~~(2) For the purpose of this section, a “seller” is any person or entity, within or outside the state, who agrees to sell tobacco products to a customer within the state. The United States Postal Service or any other public or private postal or package delivery service are not sellers within the meaning of this section.~~

~~(3) For the purpose of this section, a “carton” is a package or container that contains 200 cigarettes.~~

~~(f) A district attorney, city attorney, or the Attorney General may assess civil penalties against any person, firm, corporation, or other entity that violates this section, according to the following schedule:~~

~~(1) A civil penalty of not less than one thousand dollars (\$1,000) and not more than two thousand dollars (\$2,000) for the first violation.~~

~~(2) A civil penalty of not less than two thousand five hundred dollars (\$2,500) and not more than three thousand five hundred dollars (\$3,500) for the second violation.~~

~~(3) A civil penalty of not less than four thousand dollars (\$4,000) and not more than five thousand dollars (\$5,000) for the third violation within a five-year period.~~

~~(4) A civil penalty of not less than five thousand five hundred dollars (\$5,500) and not more than six thousand five hundred dollars (\$6,500) for the fourth violation within a five-year period.~~

~~(5) A civil penalty of ten thousand dollars (\$10,000) for a fifth or subsequent violation within a five-year period.~~

SEC. 3. Section 22963 is added to the Business and Professions Code, to read:

22963. (a) It is unlawful for any person engaged in the business of selling or distributing cigarettes or tobacco products to ship or cause to be shipped any cigarettes or tobacco products to any person in this state who is not any of the following:

(1) Licensed pursuant to Division 8.6 (commencing with Section 22970).

(2) An export warehouse proprietor pursuant to Chapter 52 of the Internal Revenue Code (26 U.S.C. Sec. 5701 et seq.).

(3) An operator of a customs bonded warehouse pursuant to Section 1311 or 1555 of Title 19 of the United States Code.

(4) A person who is an officer, employee, or agent of the federal government, or of this state or of a department, agency, instrumentality, or political subdivision of the federal

1 government or this state, when the person is acting in accordance
2 with his or her official duties.

3 (b) It is unlawful for any common or contract carrier to
4 knowingly transport cigarettes or tobacco products to any person
5 in this state reasonably believed by the carrier to be other than a
6 person described in subdivision (a). For the purposes of this
7 subdivision, if cigarettes or tobacco products are transported to a
8 home or residence, it shall be presumed that the common or
9 contract carrier knew that the person was not a person described
10 in subdivision (a). It is unlawful for any other person to
11 knowingly, or with reason to know, transport cigarettes or
12 tobacco products to any person in this state, other than a person
13 described in subdivision (a).

14 (c) When a person engaged in the business of selling or
15 distributing cigarettes or tobacco products ships or causes to be
16 shipped any cigarettes or tobacco products to any person in this
17 state, other than in the cigarette or tobacco product
18 manufacturer's original container or wrapping, the container or
19 wrapping shall be plainly or visibly marked with the term
20 "cigarettes" or "tobacco products."

21 (d) Notwithstanding any other provision of this division, upon
22 discovery by the State Board of Equalization or a law
23 enforcement agency of any cigarettes or tobacco products that
24 have been, or are being, shipped or transported in violation of
25 this section, the board or the law enforcement agency may seize
26 and take possession of the cigarettes or tobacco products. Any
27 cigarettes or tobacco products seized by a law enforcement
28 agency shall be delivered to the board, or its designee, within
29 seven days, unless the cigarettes or tobacco products will be
30 destroyed by that law enforcement agency, or unless the
31 cigarettes or tobacco products are otherwise required to be used
32 as evidence in an administrative, criminal, or civil proceeding, or
33 as part of an ongoing law enforcement operation. Any cigarettes
34 or tobacco products seized by the board or delivered to the board
35 by a law enforcement agency shall be deemed forfeited and the
36 board shall comply with procedures set forth in Chapter 7.5
37 (commencing with Section 30435) of Part 13 of Division 2 of the
38 Revenue and Taxation Code.

39 (e) (1) A violation of this section is a misdemeanor and shall
40 be punishable by a fine of not less than five thousand dollars

1 (\$5,000) but not more than fifty thousand dollars (\$50,000), or by
2 imprisonment not to exceed one year in a county jail, or both the
3 fine and imprisonment.

4 (2) In addition to the criminal penalty, the Attorney General,
5 district attorney, or city attorney may bring a civil action against
6 any person, firm, corporation, or other entity that violates this
7 section. If a court determines that this section has been violated,
8 the court shall assess civil penalties not to exceed five thousand
9 dollars (\$5,000) per violation, plus the costs of investigating and
10 prosecuting the action, including expert fees, reasonable
11 attorney's fees, and court costs.

12 SEC. 4. Section 308.1 of the Penal Code is amended to read:

13 308.1. (a) Notwithstanding any other provision of law, no
14 person shall sell, offer for sale, distribute, or import any tobacco
15 product commonly referred to as "bidis" or "beedies," unless that
16 tobacco product is sold, offered for sale, or intended to be sold in
17 a business establishment that prohibits the presence of persons
18 under 18 years of age on its premises.

19 (b) For purposes of this section, "bidis" or "beedies" means-a
20 *any of the following:*

21 (1) A product containing tobacco that is wrapped in temburni
22 leaf (*diospyros melanoxylon*) or tendu leaf (*diospyros exculpra*).

23 (2) *A product that is marketed and sold as "bidis" or*
24 *"beedies."*

25 (c) Any person who violates this section is guilty of a
26 misdemeanor ~~or and is also~~ subject to a civil action brought by
27 the Attorney General, a city attorney, county counsel, or district
28 attorney for an injunction and a civil penalty of up to two
29 thousand dollars (\$2,000) per violation. This subdivision does
30 not affect any other remedies available for a violation of this
31 section.

32 SEC. 5. Section 30101.7 of the Revenue and Taxation Code
33 is repealed.

34 ~~30101.7. (a) It is the intent of the Legislature in enacting this~~
35 ~~section to facilitate the collection of all applicable state surtaxes~~
36 ~~and sales or use taxes on cigarettes sold to residents of the state.~~

37 ~~(b) Except as provided in subdivision (d), no person may~~
38 ~~engage in a retail sale of cigarettes in California unless the sale is~~
39 ~~a vendor-assisted, face-to-face sale.~~

~~(e) For the purposes of this section, “face-to-face sale” means a sale in which the purchaser is in the physical presence of the seller or the seller’s employee or agent at the time of the sale. A face-to-face sale does not include any transaction conducted by mail order, the Internet, telephone, or any other anonymous transaction method in which the buyer is not in the seller’s physical presence or the physical presence of the seller’s employee or agent at the time of the sale.~~

~~(d) A person may engage in a non-face-to-face sale of cigarettes to a person in California provided that both of the following conditions are met:~~

~~(1) The seller has fully complied with all of the requirements of Chapter 10A (commencing with Section 375) of Title 15 of the United States Code, otherwise known as the Jenkins Act.~~

~~(2) The seller has fully complied with either of the following requirements:~~

~~(A) All applicable California taxes on the cigarettes have been paid.~~

~~(B) The seller includes on the outside of the shipping container for any cigarettes shipped to a resident in California from any source in the United States an externally visible and easily legible notice located on the same side of the shipping container as the address to which the package is delivered stating as follows:~~

~~– “IF THESE CIGARETTES HAVE BEEN SHIPPED TO YOU FROM A SELLER LOCATED OUTSIDE OF THE STATE IN WHICH YOU RESIDE, THE SELLER HAS REPORTED PURSUANT TO FEDERAL LAW THE SALE OF THESE CIGARETTES TO YOUR STATE TAX COLLECTION AGENCY, INCLUDING YOUR NAME AND ADDRESS. YOU ARE LEGALLY RESPONSIBLE FOR ALL APPLICABLE UNPAID STATE TAXES ON THESE CIGARETTES.”~~

~~(e) The State Board of Equalization shall provide information relative to a seller’s failure or attempt to comply with the Jenkins Act to the Attorney General.~~

~~(f) The Attorney General or a city attorney, county counsel, or district attorney may bring a civil action to enforce this section against any person that violates this section and, in addition to~~

1 any other remedies provided by law, the court shall assess a civil
2 penalty in accordance with the following schedule:

3 (1) A civil penalty of not less than one thousand dollars
4 (\$1,000) and not more than two thousand dollars (\$2,000) for the
5 first violation.

6 (2) A civil penalty of not less than two thousand five hundred
7 dollars (\$2,500) and not more than three thousand five hundred
8 dollars (\$3,500) for the second violation within a five-year
9 period.

10 (3) A civil penalty of not less than four thousand dollars
11 (\$4,000) and not more than five thousand dollars (\$5,000) for the
12 third violation within a five-year period.

13 (4) A civil penalty of not less than five thousand five hundred
14 dollars (\$5,500) and not more than six thousand five hundred
15 dollars (\$6,500) for a fourth violation within a five-year period.

16 (5) A civil penalty of ten thousand dollars (\$10,000) for a fifth
17 or subsequent violation within a five-year period.

18 (g) The Attorney General shall provide an annual report to the
19 Legislature regarding all actions taken to comply with, and
20 enforce, the Jenkins Act.

21 (h) This section does not prohibit any lawful sale of a tobacco
22 product that occurs by means of a vending machine.

23 (i) Nothing in this section shall relieve the seller of cigarettes
24 from any other applicable requirement of state law relating to the
25 sale of cigarettes.

26 (j) The provisions of this section are severable. If any
27 provision of this section or its application is held invalid, that
28 invalidity shall not affect other provisions or applications that can
29 be given effect without the invalid provision or application.

30 SEC. 6. No reimbursement is required by this act pursuant to
31 Section 6 of Article XIII B of the California Constitution because
32 the only costs that may be incurred by a local agency or school
33 district will be incurred because this act creates a new crime or
34 infraction, eliminates a crime or infraction, or changes the
35 penalty for a crime or infraction, within the meaning of Section
36 17556 of the Government Code, or changes the definition of a
37 crime within the meaning of Section 6 of Article XIII B of the
38 California Constitution.